United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

No. 75-7600

United States Court of Appeals

FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, AND UPON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR PLAINTIFF-APPELLANT

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September 27, 1979

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STATEMENT OF ISSUES PRESENTED

1. Whether on the present record in the district court, this Court is in a position to decide whether the exclusive blanket license tendered to the CBS television network by ASCAP and BMI is unlawful price-fixing and an unreasonable restraint of trade under the rule of reason or as a misuse of copyright?

Answer: Yes.

2. If such record is inadequate, what is proposed for the further progress of the case?

Answer: Inapplicable.

3. If the record is adequate, should the exclusive tender of a blanket or program license to the CBS television network be prohibited or limited under the rule of reason, or as a misuse of copyright?

Answer: Yes; as both.

4. If, under the rule of reason or copyright misuse, it should be determined that it is an antitrust violation for ASCAP or BMI to issue a blanket license to a television network for a single fee, would it necessarily be illegal to negotiate and issue blanket licenses to individual radio or television stations or to other users who perform copyrighted music for profit?

Answer: Not on the present record.

5. If, under the rule of reason or copyright misuse, it should be determined that it is an antitrust violation for ASCAP or BMI to issue a blanket license to a television network for a single fee, would it be equally illegal for the members to authorize ASCAP to issue licenses for individual compositions based on prices determined by the copyright owners?

Answer: No, so long as (a) copyright owners are free to license directly at negotiated prices, (b) the blanket license is not continued as an alternative, and (c) music-in-the-can contained in the network inventory at the time of the order (if not treated as in *Alden-Rochelle*) is licensed at court-set, per-use rates.

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Statement of the Case

On remand from the Supreme Court, this is an appeal by CBS Inc. pursuant to 28 U.S.C. § 1292(a)(1) from an order dated and entered September 22, 1975, dismissing the complaint after trial and thereby denying injunctive and related declaratory relief against defendants' antitrust violations and copyright misuse. The order was rendered by the Hon. Morris

E. Lasker, with an opinion reported at 400 F. Supp. 737 (S.D.N.Y. 1975), reprinted in the Joint Appendix at JA 584.[1]

In its decision of August 8, 1977, reported at 562 F.2d 130, this Court reversed, holding, *inter alia* (a) that the practice complained of (ASCAP's[2] blanket-only policy for the licensing of music performance rights to television networks) was price-fixing and illegal *per se*; and (b) that a market necessity for such a practice *vis-a-vis* radio stations and certain other users might warrant an exception to the *per se* rule in a case brought by such users, but should not preclude its application to claims brought by networks for which such necessity does not exist.

On certiorari, the Supreme Court reversed and remanded the case to this Court for further proceedings, in an opinion reported at 99 S. Ct. 1551 (1979). The Supreme Court majority did not disagree that the practice complained of is literally price-fixing, but ruled, *inter alia* (a) that the *per se* rule did not admit of exceptions (*id.* at 1561); and (b) that since it would not apply to the blanket licensing of users for which the practice was reasonably necessary, the practice as to networks could not be "automatically" invalidated but must be subjected to a rule-of-reason test (*id.* at 1565).

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[1] Portions of the record on appeal in this action appear in the Joint Appendix and are cited as indicated below:

Volume No.	Type of Document	Cited as
1-2	Pleadings, briefs, affidavits and opinions	"JA"
3-16	Trial transcript	"Tr."
17-19	Depositions	"D"
20-24	Court Exhibits ("CX"), Plaintiff's Exhibits ("PX" or "3MPX"), ASCAP Exhibits ("AX"), BMI Exhibits ("BX")	"E"

References to portions of the record not appearing in the Joint Appendix are cited to the record on appeal.

References are also made to the addenda ("Add.") to CBS's prior brief on appeal.

[2] Unless the context indicates otherwise, references to ASCAP alone apply to BMI as well.

"It may not ultimately survive that attack," the Court stated, "but that is not the issue before us today," because "we prefer [the Court of Appeals] first to address the matter" (*id.* at 1565 & n.44).

In a separate concurrence and dissent, however, Mr. Justice Stevens, adopting this Court's reasoning in significant respects and expanding upon the analysis, concluded that the district court's findings "clearly reveal that the challenged policy does have a significant adverse impact on competition" that cannot be justified, given the feasibility of less restrictive alternatives, and should thus be proscribed as "a monopolistic restraint of trade" (*id.* at 1566, 1568-71, 1572).

Nothing in the majority opinion conflicts with that analysis.

On July 6, 1979, following remand, this Court denied defendants' motion for summary judgment.

Summary Introduction to Statement of Facts

The market involved in this case is the licensing of performance rights to copyrighted music for television network use.

Those rights are owned by hundreds of separate music publishing corporations, many of which are part of conglomerate corporations as large or larger than television network companies.

Not content with whatever power accrues from their size or that derived from their statutory monopolies, these music publishing corporations do not compete on price in this market. For more than 30 years they have managed totally to foreclose the emergence of price competition by pooling their music in ASCAP and having ASCAP sell it exclusively as a block.

If they stopped that practice, and removed ASCAP from this market, it would be thoroughly competitive. (As this Court

already found, a "direct negotiating market can surely exist if the blanket license is eliminated." 562 F.2d at 138.) And they could stop, without the slightest cost or risk to themselves, except those attributable to price competition.

Moreover, they control, through ASCAP, the totality of the facilities now in existence for licensing music on per-use terms. To devote those facilities to that less restrictive method of licensing would also permit the development of competitive conditions.

They refuse to do either. That is the gist of this case.

In rule-of-reason terms, the record demonstrates that ASCAP's all-or-nothing blanket licensing policy (a) has a significant adverse effect on price competition in the licensing of music performance rights for television network use, (b) represents a classic case of economic discrimination, and (c) is far more restrictive than reasonably necessary in the light of perfectly feasible and significantly less restrictive alternatives.

The record further shows that ASCAP insists on this policy and refuses to cooperate in the development of competitive alternatives because its members wish to achieve precisely those anticompetitive effects.

Statement of Facts

By law, copyrights on musical compositions are granted to writers. By commercial practice, they are invariably assigned by writers to music publishing corporations.[3] Hence, the sellers are such corporations.

For the purpose of dealing in performance rights for television network programs (and those licensed to certain

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[3] Under the ASCAP distribution system, 50% of all distributable royalties go to music publishing corporations. While writers are free to contract with publishers to obtain part of the publishers' share, there must be some publisher entity to which the copyright has been assigned in order for the use of the music to receive a publisher distribution. E 115; *see also* 562 F.2d at 135 n.13, 136 n.15.

other categories of users) all such sellers in the United States[4] turn over to a central Committee, ASCAP, the right to market their products at prices and terms fixed by the Committee. The Committee then presents the network with a take-it-or-leave-it blanket deal: the entire package of these pooled copyrights at a single annual package price. 562 F.2d at 132-33, 134 n.9; *see* 400 F. Supp. at 742-43; 99 S. Ct. at 1555; *id.* at 1566-67 (Stevens, J.).

The economic irrationality of this deal—to achieve anything other than the elimination of price competition and the seller-advantages flowing from that—is demonstrated by the following facts:

First, music rights are not pooled or sold in a package for use in motion pictures, phonograph records, or sheet music, or even television network programs (when the right is limited to recording songs in sound tracks in synchronization with performances). In those markets, not occupied by ASCAP, music rights are sold at a separate price for each use; those prices are negotiated directly between seller and producer; and thus sellers compete vigorously in all respects, including price.[5] 400 F. Supp. at 759-60; 562 F.2d at 135 & n.13; 99 S. Ct. at 1563 n.37; *id.* at 1569 & n.25 (Stevens, J.).

Second, the producer (or, as known in the industry, "packager") of television programs now buys directly all other

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[4] Through different subsidiaries, all significant music publishing corporations in the country belong both to ASCAP and BMI (E 6-7 (para. 17); Cramer Tr. 4282).

[5] It might be noted that the direct-licensing market for mechanical rights is substantially more extensive than would be the direct-licensing market for performance rights for television network use. The district court found as to the latter that "the number of direct licensing transactions required each year from outside publishers would range from approximately four thousand to eight thousand" (400 F. Supp. at 762; *see* 99 S. Ct. at 1563 n.35). The Harry Fox Agency alone issues approximately 60,000 mechanical rights licenses per year (for which publishers receive approximately $45,000,000 in fees) (Berman Tr. 829, 833).

products, services and rights necessary for a program, including the synch rights to music, and sells certain broadcasting rights to the finished product to the network. (Packager companies, which are independent of the networks and produce virtually all network entertainment programming, retain title to such programs and thus the right, among others, to syndicate them for local station use after the network runs have been completed.) No separate licensing agreement is necessary between a network and the owners of the copyrighted *literary* or *dramatic* material on which the program is based. But, under the blanket-only system for music performance rights, while the packager selects the songs to be used, and produces each performance, all licensing of music performance rights is done between ASCAP and the network. Hence, the packager is precluded from dealing for performance rights, not only with publishers, but with his own staff writers who compose original music for the program, and thus from making price/benefit trade-offs between music and other program elements (as well as among musical compositions themselves). 400 F. Supp. at 742-43, 759; 99 S. Ct. at 1568-69 (Stevens J.); Fisher Tr. 1664-79, 1682-83, 4784-88; Nathan Tr. 4022-25.

Third, not only must the packager forbear from licensing performance rights, he is obliged to take pains to split off performance rights from transactions in which he must otherwise engage. Packagers now deal directly with composers of original music created especially for their programs (theme, background and occasional feature music), paying them considerable sums for creating and orchestrating the music and granting the synchronization rights to it (400 F. Supp. at 742-43, 759-60; Wright Tr. 422-24; Vincent Tr. 599-601; Sunga Tr. 745-49). Yet the packager is made to split the performance rights from those contracts, for otherwise the composers would not receive ASCAP distributions (*see* Marks Tr. 2548-49, 2636; E 1540 (art. 13(c), (d))). Packagers also deal directly with music publishing corporations for synch rights to previously published music (400 F. Supp. at 759); and, for the same reason, performance rights must be split off from those transactions (Marks 2548-49, 2636; PX 550).

Fourth, the same pattern obtains with respect to music used in theatrical motion pictures. Here, the motion picture producer obtains synch rights directly from the composers of music written especially for the film and from the music publishing corporations owning previously published compositions. Those licenses cover both the exhibitors (movie theaters) and all television users (networks and stations). In the same transactions, the producer also directly licenses performance rights to cover the theatrical exhibitors of the film, but is obliged to split off television performance rights from the licensing contract. PX 552-58, Berman Tr. 776-77; Mingle Tr. 852-53.

Fifth, when music publishing corporations distribute ASCAP royalties to themselves, they do so on a per-use basis. Indeed, they must go to the trouble of fashioning elaborate formulae for giving themselves specified amounts for each type of use (feature, theme or background) made of their music during the license term. Such formulae are necessary because the licensee does not pay, let alone negotiate, separate prices for each use, and there is no marketplace to establish competitive values. 400 F. Supp. at 742; 562 F.2d at 136 n.15; 99 S. Ct. at 1569 (Stevens, J.).

Sixth, the blanket-only policy not only fails to produce a single procompetitive effect, it does not even achieve any economic benefit that would not be better or as well achieved under competitive conditions, such as those which characterize the markets for movie, mechanical, print, and television synchronization rights (*see* pp. 34-42, *infra*). Such conditions would eventuate if ASCAP were to license at a separate price for each use; and an organization which *pays out* on a per-use basis to its members can readily *take in* on a per-use basis from its customers (99 S. Ct. at 1569 (Stevens, J.); *see* 562 F.2d at 140).[6] Indeed, fully competitive conditions would promptly

[6] ASCAP's incremental expenses of administering such a system would be *de minimis,* as the testimony of two distinguished experts, which defendants did not even attempt to rebut, so plainly showed (Southworth Tr. 2159-74, 2176-89; Kaplan Tr. 2280-92).

emerge if ASCAP were simply to cease licensing networks, as it was forced to cease licensing movie exhibitors (*see* 562 F.2d at 133, 138; 99 S. Ct. at 1569 (Stevens, J.)). And ASCAP could do that without the slightest cognizable risk or cost to itself or its members.

Why does ASCAP refuse to do either? Because to do so would dissipate the power of its pool.

Enormous anticompetitive potential obviously inheres in the creation by otherwise-competing publishers of a copyright pool of this magnitude: more than three million songs (400 F. Supp. at 742; 99 S. Ct. at 1555). It is increased significantly when, by agreement with 34 foreign licensing organizations, the pool is enlarged to encompass the preponderance of music copyrighted in the free world (E 44, 46, 56; PX 578; Finkelstein D 550). And that anticompetitive potential is plainly realized to the maximum possible extent when that pool is licensed on an all-or-nothing blanket basis.

If there were a necessity for that practice, one might reasonably conclude that, however much this combination of sellers desired to achieve the natural consequences of their act (the suppression of price competition), the fact was they had no other choice. But once it is found, as it has been here, that they have such a choice—because less-restrictive alternatives are perfectly feasible—the motivation for the practice cannot be explained by any purpose other than to capitalize on that anticompetitive potential.

Who are the principal beneficiaries of this system? In the main, the large conglomerates: Warner Communications, Gulf & Western, Transamerica, MCA, Twentieth Century-Fox, EMI (a $1.7 billion-a-year British conglomerate, which owns Capitol Records and Screen Gems[7]) and Polydor (a Dutch conglomerate which owns Chappell Music). These corporations, along with the old-line publisher groups controlling the preponderance of Broadway show musicals (such as Shapiro-

[7] *See* "Paramount and EMI Halt Music Venture," *New York Times,* Sept. 13, 1979, p. D 4, col. 5.

Bernstein, Schirmer and E. H. Morris) regularly take in more than 60% of the ASCAP publisher distributions and thus dominate the ASCAP Board (votes being a function of distributions). E 148-50, 660; PX's 94, 416; Dean Tr. 1812; Chiantia Tr. 2856-60. *See also Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 892 (S.D.N.Y. 1948).

How are these and other ASCAP members so advantaged by the blanket-only system? In principally three ways:

(1) by eliminating price competition and thus elevating price;

(2) by achieving economic discrimination in their favor; and

(3) by confronting the buyer with unprecedented costs and risks as the price of attempting to establish a competitive market.

The Elimination of Price Competition and the Elevation of Price.

1. The cardinal feature of the blanket license is that the network pays the same price (a percentage of its revenues or an annual flat fee) whether it uses five compositions a year or 5,000. For the blanket licensee, therefore, music as a block is a fixed expense; there are no incremental charges for each use (or, as economists alternatively express it, each use is free "at the margin" once the user commits to pay the blanket price) (Fisher Tr. 4784). For a blanket licensee to negotiate a direct license would mean paying twice for the same music. There is, accordingly, no direct dealing and no price competition. It's that simple.

2. ASCAP charges, as its economic expert, Mr. Nathan, agreed, the highest prices "the market will bear" (Tr. 3985). (As Mr. Nathan further explained, "If they charged less, then I think their membership ought to change the management" (*id.*).) In its power to do so, it is restrained only by the possibility of consent decree rate-making litigation; but it

necessarily recognizes that users are themselves limited in their resort to such an alternative by the enormous costs and uncertainties involved (*see* 562 F.2d at 138 n. 23)—and, indeed, there has never been such a litigation setting a "reasonable" fee for an ASCAP blanket license (*id.*).[8]

Economic Discrimination.

1. Another reason "the market will bear" monopoly rent is that the blanket-only system enables ASCAP to charge each network differently and up to the network's ability to pay (short of the point the network will be driven to litigate fees in consent decree proceedings). While ASCAP has traditionally charged each network the same percentage of revenues, that percentage figure has necessarily produced different dollar amounts (and the flat fees more recently negotiated have continued to reflect those differences (PX's 525, 526; *United States* v. *ASCAP (Application of Columbia Broadcasting System, Inc.)*, Dkt. No. 13-95 (S.D.N.Y., Order of August 11, 1970) (Ryan, J.); E 501-02, 1051-52, 1148-49).

Such economic discrimination does not occur in competitive markets, such as those in which networks bid for broadcasting rights to theatrical motion pictures or other programs.

Thus, as Mr. Justice Stevens concluded,

> "The blanket all-or-nothing license is patently discriminatory. . . . [I]n this unique all-or-nothing system, the price is based on a percentage of the user's advertising revenues, a measure that reflects the customer's ability to pay but is totally unrelated to factors—such as the cost, quality, or quantity of the product—that normally affect price in a competitive market." 99 S. Ct. at 1568 (footnotes omitted).

See also 562 F.2d at 136.

2. Additionally, because the program packager does not pay for music performance rights at all, let alone pay separate prices for each use, the blanket-only system discriminates in

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[8] The BMI decree, of course, does not even contain provisions for rate-making proceedings (*id.*; E 1568).

favor of (a) previously published compositions to the disadvantage of new music especially written for television, (b) established compositions to the disadvantage of those less known, and (c) all music to the disadvantage of other programming elements. Fisher Tr. 1664-79, 1682-83, 4784-88; Nathan Tr. 4022-25. As Justice Stevens stated,

> "Because the cost to the user is unaffected by the amount used on any program or on all programs, the user has no incentive to economize by, for example, substituting what would otherwise be less expensive songs for established favorites or by reducing the quantity of music used on a program. The blanket license thereby tends to encourage the use of more music, and also of a larger share of what is really more valuable music, than would be expected in a competitive system characterized by separate licenses. And since revenues are passed on to composers [and, obviously, publishers] on a basis reflecting the character and frequency of the use of their music, the tendency is to increase the rewards of the established composers [and their publishers] at the expense of those less well known." 99 S. Ct. at 1569 (footnotes omitted).

Indeed, the record plainly indicates that new music written for television is now the victim of economic discrimination in the sense that its use would increase in a competitive market in relation to the use of published music. For the use of such new music is now substantial despite the fact that it bears a total incremental cost (in terms of amounts that packagers must pay composers to have them write such music) and is forced to compete against published compositions which are free at the margin (Fisher Tr. 1682-83, 4784-88; Wright Tr. 422-24; Vincent Tr. 599-601; Sunga Tr. 745-47).

The chief beneficiaries of these results are, of course, the conglomerates and old-line music publishing corporations which own the preponderance of published music and the established favorites. There is no more reason why such corporations should be favored over those composers who now

seek to create new music for television use, than there is why any music supplier should be favored over the authors of scripts or the creators of costumes or scenery.

The Creation of Barriers to Direct Licensing.

Based on the district court's findings, Justice Stevens concluded that any television network management decision to "embark on a competitive crusade" (*i.e.*, to attempt a bypass of ASCAP's blanket license) is "unquestionably inhibit[ed]" by the "unprecedented costs and risks" of such an undertaking, coupled with "certain and predictable costs and delays" (99 S. Ct. at 1571).

In a legal sense, these constitute "barriers" to entry to a competitive market (*id.*). They arise from the fact that the practice complained of is a joint agency method of sale which supplants direct dealing on a nationwide scale and is ingrained. Sellers manifestly prefer it and resist change (562 F.2d at 139, 140; Add. A-C). They have no facilities for direct dealing and do not want them (*id.*; E 6 (para. 16)). No one *seller* could single-handedly dismantle this system without incurring extraordinary costs and risks.[9] The same is true for any single *buyer*.

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[9] Warner Brothers' attempt at direct licensing in the 1930's led to the exodus from its catalogs of some of the "foremost names in the music world," the "alienation of all the writers" and "their completely antagonistic" and "rather violent" reactions (Morris D 646-49, 731).

The reasons for those reactions are equally applicable today. In the first place, any publisher, even one the size of Warner Brothers, would have difficulty competing against ASCAP's vast pool, since all users have blanket licenses to that pool, and all compositions in it are free at the margin to blanket licensees. In the second place, the writers regarded the Warner Brothers bypass attempt as "an act of disloyalty" to ASCAP (Morris D 649); that they would react the same way today was the considered judgment of the man most likely to know: Buddy Morris, then operating head of the Warner Brothers music publishing companies, and now an ASCAP Director and President of one of its larger publisher members, Edwin H. Morris & Co., Inc. (D 731).

1. Perhaps the most visible problem for a network buyer is music-in-the-can—specifically the leverage the copyright owner would derive, not from the competitive value of his music, but from the fact that it was already recorded in the sound track of the motion picture or program for which the network had already committed to pay.

The CBS inventory, at any given time, is worth $100 million or more and contains in excess of 13,000 copyrighted musical compositions (Sipes Tr. 52; PX's 994, 995 (paras. 1-2)). While the prices that publishers (and writers having the right of consent[10]) could command for such music would doubtless vary from extreme demands to the more modest, overall, randomized over thousands of transactions, some significant premium would inevitably be paid over competitive market price levels (Nathan Tr. 3903, 4052; Fisher Tr. 1686-87, 4805-08).

Rational businessmen do not, as ASCAP's economist, Mr. Nathan, testified, place themselves in a position where they must deal with a "unique source" of supply (Tr. 4088-89). That is the music-in-the-can problem with a vengeance.

The district court's finding that that problem would not rise to the level of concerted "hold-ups" by copyright proprietors (in the nature of a boycott) (400 F. Supp. at 775-76) is beside the point, for the reason just mentioned and others recognized by Justice Stevens (99 S. Ct. at 1570-71 & n. 31). Economists for both sides substantiated the material and self-evident

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[10] Most of the music-in-the-can is owned by "outside" publishers (those not affiliated with the companies that produced the programs or films) and/or written by AGAC members or others whose contracts with publishers preclude direct licensing without the writers' consent (400 F. Supp. at 761; E 433 (para. 4(k)); PX's 461; Chiantia Tr. 2979). The music owned by "inside" publishers (those who are so affiliated) is generally subject to the same writer-consent limitation on direct licenses—either through AGAC or AGAC-type contracts (in the case of published music) (400 F. Supp. at 761; E 433 (para. 4(k)); Chiantia Tr. 2979) or CLGA collective bargaining agreements (in the case of music written for the program or film) (E 1540 (art. 13(c)); Green Tr. 3446, 3451-52).

proposition that it would inflate price (Fisher Tr. 1686-87, 4805-06; Nathan Tr. 3903, 4052). Indeed, BMI maintained in its trial memorandum that the music-in-the-can situation would give the copyright proprietor "the power to name his price"; would "result in occassions on which CBS will be unable to use finished material without paying very large sums for performance rights"; and would pose a situation which "CBS would find . . . intolerable" (BMI Trial Memorandum, dated April 25, 1973, at 35-36, JA 354).

(As an attempted counter to those admissions and the testimony of its own economist, ASCAP generally points to the testimony of its Vice President and Director, Salvatore Chiantia (also President of MCA Music and the National Music Publishers Association) to the effect that he is prepared to be "reasonable" on music-in-the-can since CBS is a large customer (Tr. 2895-98). This, says ASCAP, is all the assurance CBS needs to disregard the music-in-the-can problem.

But Mr. Chiantia's assurance is meaningless. It gives little if any weight to the incentive that publishers generally would have to capitalize on their single-source bargaining position. It also ignores the incentive that writers and writers' estates would have (in exercising their consents) to prevent the publisher from making a gift of that single-source power. It further disregards the point Justice Stevens made, quoting from the Solicitor General's brief, that

> " 'the prospect of such negotiation offers the copyrights owners an ability to misuse their rights in a way that ensures the continuation of blanket licensing despite a change in market conditions that may make other forms of licensing preferable.' " 99 S. Ct. at 1571 n.31.

And it ignores the plain fact that since direct licensing has never occurred, and since there is therefore no index of competitive market values, premiums on music-in-the-can would not have the notoriety that Mr. Chiantia's argument presupposes, but rather would represent the market norm.)

Moreover, the music-in-the-can problem with respect to programs and motion pictures not in the network's inventory (but on which the network will wish to [illegible] in the future), though different in degree, is, in the aggregate (considering the far greater number of such films), equally acute for a network *attempting to bypass* the blanket license. Here, the copyright proprietors' leverage derives, not from the fact that the bypassing network is already committed to pay for the films, but from the fact that it would be placed at a competitive disadvantage if it were precluded from bidding on this vast source of programming material while blanket-licensed networks were not.

In a market characterized entirely by direct licensing, all three networks would be in the same boat with regard to these noninventory films and programs. To be sure, the copyright owners would still have incremental leverage as the single source of each such song (*i.e.*, greater leverage than they would have prior to the filming of a performance when other songs having a higher price/benefit to the film could be substituted[11]). But they would not possess the additional single-source leverage of being able to play a bypassing network (which could not obtain extremely valuable motion pictures without getting them to deal for the songs) against two other networks (which had no need for a direct license).

2. Another barrier which would pose unprecedented costs and risks to a bypassing network stems from the fact, as the district court found, that there do not presently exist adequate marketing facilities, institutional or otherwise, for the direct licensing of such music to television networks (400 F. Supp. at 757, 759). Indeed, the parties stipulated that publishers do not even have the "facilities or procedures for processing such requests" (E 6 (para. 16)), and the publishers freely testified they do not want them (Add. A-C).

[11] It is clearly practicable today for the motion picture producer to obtain television network performance rights for copyrighted music used in movies, at the same time he acquires synch rights for television and synch and performance rights covering the theaters' use of the music in connection with their exhibition of the film.

The district court, accordingly, recognized that if CBS suddenly canceled its blanket license "tomorrow," "there might well be problems of the kind [CBS] described" (400 F. Supp. at 759). And while the court further found that such facilities would ultimately be created for a network which announced its intention to cancel, the court acknowledged that this could not be done "without a long period of advance preparation" (*id.*) of a year or more duration—"the inevitable interval between CBS' notice of termination of its blanket license and the date on which it actually commenced direct licensing for all its needs" (*id.* at 777). In Justice Stevens' words,

> "The District Court did not find that CBS could cancel its blanket license 'tomorrow' and continue to use music in its programming and compete with the other networks. Nor did the District Court find that such a course was without any risk or expense. Rather, the District Court's finding was that within a year, during which it would continue to pay some millions of dollars for its annual blanket license, CBS would be able to develop the needed machinery and enter into the necessary contracts." 99 S. Ct. at 1570.

Thus, these "barriers to direct dealing," said Justice Stevens, are both "real and significant," even if "not insurmountable," and

> "Far from establishing ASCAP's immunity from liability, these District Court findings, in my judgment, confirm the illegality of its conduct." *Id.*

3. Another factor which exacerbates both the music-in-the-can and the lack of facilities problems is that music publishing corporations and writers profoundly desire not to deal directly. Advantaged by the absence of price competition and the presence of economic discrimination in their favor, it is hardly surprising that their antagonism to this prospect runs deep.

The district court found that ASCAP members have "a strong preference" for the blanket-only system because of the

"bargaining clout" amassed when dealing collectively and the avoidance of "possible financial uncertainty" and "difficulties" associated with "intense competition" (400 F. Supp. at 767). While those findings euphemistically describe the evidence—glossing the actual *intensity* of the publishers' and writers' aversion to a direct licensing future (Add. A-C)—they adequately make the point, which is, indeed, independently obvious.

As this Court found, the blanket-only policy "provides a disinclination to compete" (562 F.2d at 140), since

> "the very availability of the blanket license itself involves the fixing of a collective price, which must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete." *Id.* at 139 (emphasis in original).

This does not mean that music publishing corporations would refuse to deal directly with a bypassing network while the blanket-only policy remained in effect. Almost any businessman can be made an offer he cannot refuse.

It means there exists in this market a peculiar economic force, foreign to competitive markets and generated by the very fact that the market is now, and for more than 30 years has been, thoroughly noncompetitive.

Of course it can be overcome at a price. But the very necessity to pay that price is one of the unprecedented costs of, and hence, in a legal sense, barriers to, the emergence of competitive conditions.

Anticompetitive Intent.

Can there be any doubt on this record that the elimination of price competition, the benefits of economic discrimination, and the ability to seek safety behind barriers that arise from and perpetuate this system are deliberate and intended results of the blanket-only policy? Not the slightest.

1. For almost 30 years, from 1921 to 1950, ASCAP fought the emergence of competitive conditions in the licensing of performance rights for motion picture use. They fought in the Congress, in the FTC, in the Department of Justice and finally in the courts (*Alden-Rochelle, Inc.* v. *ASCAP,* 80 F. Supp. 888, 900 (S.D.N.Y. 1948) (two opinions); *M. Witmark & Sons* v. *Jensen,* 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons* v. *Berger Amusement Co.,* 177 F.2d 515 (8th Cir. 1949).

In *United States* v. *ASCAP (Application of Shenandoah Valley Broadcasting, Inc.),* 208 F. Supp. 896 (S.D.N.Y. 1962), *aff'd,* 331 F.2d 117 (2d Cir.), *cert. denied,* 377 U.S. 997 (1964), ASCAP fought the development of competitive conditions for the licensing of performance rights for use in independently packaged local station programs (non-network or off-network programs)—and ASCAP is still fighting that battle in *Buffalo Broadcasting Co.* v. *ASCAP,* 78 Civ. 5670 (Complaint filed November 27, 1978), now pending in the Southern District of New York.

ASCAP fought the development of competitive conditions in the network field with its pull-all-stops opposition to NBC's 1970 application for a "nucleus" license covering background music libraries and some 2,200 standard compositions (the works predominantly used on NBC programs and in its inventory of films in-the-can). *United States* v. *ASCAP (Application of National Broadcasting Co.),* 1971 Trade Cas. ¶73,491 (S.D.N.Y.), *appeal filed,* Dkt. No. 71-1487 (2d Cir.) (settled and dismissed). Obviously, ASCAP still wages that battle as well in the present suit.

The music publishing corporations could have terminated this case at any time by agreeing to remove their collective licensing apparatus from the marketplace. In fact, they could have prevented its commencement in December 1969 simply by agreeing to negotiate the terms of a per-use license. However, as ASCAP's President, Stanley Adams, testified, the relief CBS sought was regarded by the ASCAP Board as "a match to [our] house," and no serious consideration was given to anything other than getting "a hose to put out the fire" (D 7).

2. ASCAP's general counsel for more than 40 years, Herman Finkelstein, testified in 1956 to the following effect before a special committee of the Judiciary Committee of the House of Representatives:

> "[A]n organization like ASCAP or BMI or anybody else, should not be permitted to combine in great numbers, unless there is a necessity for that combination. ASCAP is a voluntary association. By its consent decrees its activities are limited to those things for which the combination is necessary, that is, it can only license the non-dramatic performing rights, because in all other fields the writer and the publisher can shift for themselves and so can the user." (E 610; Tr. 3679)

But it is perfectly obvious that buyers and sellers can readily "shift for themselves" in the movie rights and television network fields (and we believe the same will be established with respect to the licensing field involved in *Shenandoah* and now *Buffalo Broadcasting*). That is exactly what the users in those cases were and have been saying.

Direct licensing in those markets was or is blocked by the same factors of music-in-the-can, lack of facilities and disinclination to deal directly discussed immediately above. Indeed, a direct-licensing market came into being and is now fully functioning in the movie rights field only as a result of the court's recognition of those barriers: most particularly that the music-in-the-can problem would place the user "in an obviously impossible bargaining position" (hence the court's entry of relief enjoining ASCAP and its members from enforcing copyrights to such music-in-the-can). *Alden-Rochelle Inc.* v. *ASCAP, supra,* 80 F. Supp. at 904. The barriers here could be removed just as easily by decree or, of course, by ASCAP's voluntary cooperation.

3. The reasons for ASCAP's adamant refusal to cooperate have been explicitly conceded time and again on this record —*e.g.*, "as individuals we have no strength" and "it's important as a publisher to combine with other publishers" (Goodman

Tr. 1631-32); "in unity there is strength and in disunity there is weakness" (Brettler D 201); "ASCAP has a superior bargaining position than any one or group of its publishers" (Morris D 720); and the "umbrella" speech rendered by ASCAP's President, Mr. Adams (E 449), which, in addition to admonishing that "there can be nothing as important as presenting a united front across the negotiating table" (E 454) and that "little deal[s] on the side" make "hole[s] in the fabric of the umbrella" (E 455), articulated the cartel's purpose concisely:

> "To resist the splitting of our ranks so that we can be picked off one by one." (E 450)[12]

Even ASCAP's economic expert witness, Mr. Nathan, was constrained to agree, on questioning by the court:

> "THE COURT: . . . . Don't you think it is reasonable to assume that the writer does believe that it is an advantage to be a member of ASCAP because he doesn't have to compete for the price?
>
> "THE WITNESS: I suspect, your Honor, that is true. . . ." (Tr. 3909)[13]

But these admissions are not confined to the testimony of important ASCAP publishers, board members and executives.

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[12] We urge that all these quotations be read in full context, for they underscore these points even more dramatically when they are.

[13] As to the recognition that blanket licensing economically discriminates in favor of music to the disadvantage of other programming elements, Mr. Chiantia testified:

> "THE COURT: What is it that makes you conclude even if only tentatively that, what are the factors in your mind when you say that your guess is that you would have less use of your music [in a direct licensing system]?
>
> "THE WITNESS: Well, under the present system, your Honor, a producer of a program can use as much or as little music as he pleases, the price is the same. CBS pays a certain performance —a certain fee for the right to perform all of the music. If he suddenly became budget conscious, he might reduce the amount of compositions that he is going to use in his show." (Chiantia Tr. 2955)

The organization has itself conceded anticompetitive purpose and effect in equally vivid and explicit terms. Thus, on NBC's application for a "nucleus" license ASCAP's general counsel, Mr. Finkelstein, stated to the district court, in an affidavit of May 15, 1970 (para. 9),

> "NBC has been prevented as a practical matter from using its combined network buying power to drive down the price paid for musical compositions to a figure dictated by the network by the provision in the Amended Final Judgment enabling this Court, on application of the user, to set a reasonable fee for the ASCAP repertory (Sec. IX(A)) . . . In order to allow it to drive down prices for the additional compositions NBC needs the assurance that it will have a nucleus of compositions available at a fee set by the Court. If NBC has that assurance plus the right to compel writers and publishers to deal individually for additional compositions, judicial control of the NBC power to fix prices will no longer exist."

Stripped of pejoratives and slogans, that affidavit and others filed to the same effect were saying nothing less than (1) direct licensing would cause a substantial reduction in present prices; (2) ASCAP's function is to suppress such competition; (3) the purpose of the rate-making procedures of the consent decree is not to protect the public interest in achieving competitive prices, but to assist ASCAP in achieving the reverse (*see also, e.g.*, E 390, 405).[14]

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[14] The unreasonableness of that position was attacked by the Department of Justice in its brief on appeal to this Court in the following terms:

> "[W]hat is eliminated under a license for ASCAP's entire repertory is price competition between ASCAP members. This result is tolerated to the extent that blanket and per program licensing is a practical necessity. It is on that basis that the result in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (C.A. 9) certiorari denied, 389 U.S. 1045 (1967), can be supported. There the courts upheld ASCAP's licensing practices against the challenge of local broadcasters who concededly could not negotiate directly with individual ASCAP members for performing

In fact, the basic thesis of ASCAP's counterclaim in this case (where ASCAP alleges that CBS and NBC, through their respective antitrust and consent decree proceedings, have attempted to "depress the price each pays for performance rights of musical compositions" (JA 56)) is that prices would be lower if the music publishing corporations were forced to compete on price.

4. Also implicit in ASCAP's position in the five suits and Congressional testimony reviewed above is its recognition that there are (or in the case of movie rights, were) sufficient barriers to direct licensing to stop the user from making a bypass attempt—barriers that the litigation it was then contesting could promptly remove. For if ASCAP believed that there were insufficient barriers to direct licensing, or that judicial remedies would not remove them, ASCAP would not have bothered to oppose those suits. Indeed, Mr. Finkelstein's affidavit statement that—

> "In order to allow it to drive down prices for the additional compositions NBC *needs* the assurance that it will have a nucleus of compositions [*e.g.*, we note, music-in-the-can] available at a fee set by the Court (Affidavit of May 15, 1970, *supra*, para. 9 (emphasis added); *see also* E 400)

—articulates exactly that perception.

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rights. NBC has not made a similar concession here, and in fact wants to begin dealing directly. ASCAP's refusal to cooperate is thus not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940)." Brief of the United States at 13-15, dated July 1971, *United States* v. *ASCAP (Application of National Broadcasting Co.)*, Dkt. No. 71-1487 (2d Cir.).

After the briefing of the NBC appeal, the case was settled by ASCAP's granting NBC the right to have a per-use license if CBS obtains one in this suit.

The Removal By Per-Use Licensing of All Anticompetitive Effects.

If ASCAP could be made to license at a separate price for each use, price competition would immediately emerge, economic discrimination would immediately disappear, and all barriers to direct licensing would evaporate.

Sounds like magic? It's not. Competition is a natural force. It is now dammed by an unnatural construct. Remove that dam and it will flow.

Under such a system, the packager, who selects music, would obtain it. On each use, if he did not accept the ASCAP per-use price (which would be, in effect, a "list" price), he would receive competitive bids from the music suppliers (Wright Tr. 442-44, 539-40; Vincent Tr. 611-14, 679-85; Sunga Tr. 758-59). He would make his decision to buy each music performance right and each other program element by weighing the benefits of each element (in terms of its contribution to the entertainment value of the program) against its price (Wright Tr. 444-45, 453-56; Vincent Tr. 628-33, 678-85; Sunga Tr. 758-59). Thus, new or lesser known music would compete fairly against established favorites; music especially written for the program would compete fairly against previously published music; and all music would compete fairly against other programming elements. Resources would be efficiently allocated. Economic discrimination would be gone.

So would the barriers to direct licensing.

The ASCAP per-use license should cover music-in-the-can, with the ASCAP per-use fee for such uses set by the court (if it could not be negotiated by the parties) at the competitive market level that would soon be evidenced by direct licensing transactions. (Such coverage need not continue indefinitely, for reasons discussed in Point III of this brief dealing with questions of relief.)

Moreover, since some direct licensing would become feasible immediately, even with music publishing corporations

initially lacking direct licensing facilities, the publishers would have the incentive to create and expand such facilities in order to capture more of the direct licensing business. By the same token, they would no longer have the incentive not to—since their present disinclination to deal directly is a product of their preference for the very blanket-only policy that ASCAP's commencement of per-use licensing would remove.

Of course, all new music especially written for network programs could be licensed by packagers at the same time and in the same contracts in which they now commission composers to write such music and grant the synch rights.

As a greater proportion of the transactions were negotiated directly between user and publisher (or composers, in the case of new music written especially for television), there would be no licensing function for ASCAP to serve, other than to act as a collection agency for uses of music-in-the-can. Indeed, if ASCAP ceased licensing in this market, there is solid basis for believing that the publishers would not want ASCAP to continue monitoring network uses (for the purposes of detecting infringements); or that, if they did, the monitoring function would be far more limited and less costly than at present.

ASCAP now monitors and makes complete records of every single television network use—but only because it must for distribution purposes (Marks Tr. 2465-65a, 2469-72, 2477; Poklitar 2060-62; E 219, 222-24). If licensing transactions were made directly, so that ASCAP were not involved, it would have no distributions to make and no need for its elaborate computerized monitoring system for network uses.

Would there be any need for monitoring at all, other than, perhaps, on a spot-check basis? Television network uses are memorialized and highly detectable events—not ephemeral as, it has been argued, are radio station uses. All network programs, besides being viewed simultaneously by many millions of people, are recorded on tapes and films. Even more, logs and cue sheets of all music uses are regularly maintained by program packagers and networks. The music publishing

industry does not waste money on systematic monitoring of phonograph records, sheet music or movie uses, and there is no more reason to expect they would here. Those other users are (and networks could be) essentially self-policing—a system which works because the penalties for infringement are severe and the possibility of detection, high. Mingle Tr. 883-85; Berman Tr. 840-41, 931-33; Poklitar Tr. 2060-64; Marks Tr. 2469-73, 2484; Fagan D. 430-32; E 247-48, 498, 1048-49.

So it is no wonder that ASCAP's President, Stanley Adams, described per-use licensing, in a deposition in this case, as a "match" that "might burn down its [ASCAP's] house" and a proposal that ASCAP's Board could summarily reject without even listening to its terms (D 7). It is equally unsurprising that Justice Stevens could categorically declare on the basis of the findings that "the record demonstrates that the market at issue here is one that could be highly competitive, but is not competitive at all" (99 S. Ct. at 1569).

That is why defendants have so vigorously opposed this suit, despite the fact that it seeks no damages for the past, will not result in the payment of damages to other users,[15] and, indeed, will cost them absolutely nothing except the necessity to compete.

In short, ASCAP is an anachronism in this market which no one but its members wishes to preserve, and they, solely for anticompetitive purposes.

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[15] The other television networks have made that clear (see *amicus* briefs of NBC and ABC). The television stations have also so indicated in their *amicus* brief to the Supreme Court (at 3). ASCAP has always maintained that it could win any suit against radio stations and other users on market-necessity grounds; and that was the ground, stipulated in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert denied*, 389 U.S. 1045 (1968), on which the Department of Justice there supported ASCAP's position regarding radio stations (JA 130 (Memorandum for the United States as Amicus Curiae, urging denial of petition for certiorari)).

Feasibility of a Direct Licensing Market.

This is the way direct licensing would work, and the way the machinery would necessarily be created, as a result of relief in this case.

The packager of the program would, as now, select the compositions he desired to use on a program about to be taped or filmed. His employee or agent would then call each music publishing corporation in interest (or its agent) and negotiate a license fee for both the performance and synchronization right. The publisher would send a standard form license and bill to the packager who would sign the license, retain a copy and pay the bill.

That is, in essence, how direct licensing is now conducted in the movie, television synchronization, phonograph record and sheet music fields (*e.g.*, 400 F. Supp. at 759-60, 763; Berman Tr. 799-802, 804-07, 811-12, 921-22; Mingle Tr. 865-66; Lane Tr. 1076-77; Shulman Tr. 3082; Brettler Dep. 433-34; PX's 550, 552-58, 560-61; *see also* 99 S. Ct. at 1563 n.37). There is no earthly reason to expect it would be any more difficult or complex in this one.

Of course, to bring it to that level of simplicity, a number of things would have to be done—all of which are eminently performable.

First, the packager will have to increase his budget (since it will include music performance rights for the first time) and thus charge the network a higher price for broadcasting rights to the program. Obviously, there is no problem in that.

Second, the packager must have some means of ascertaining which music publishing corporations own the music he desires to use. In obtaining television synch rights, he learns that by calling the Harry Fox Agency—but he must then deal through Fox, and the fee charged by the publisher doubtless passes on to him all or some of the small Fox commission. Fox has only two employees handling the television synch rights deals (400 F. Supp. at 760). To handle the greater volume of

performance rights deals would require, according to its managing director, Albert Berman, "a greatly augmented staff, greatly augmented physical facilities" (Berman Tr. 935-36)[16]. ASCAP says that Fox would willingly incur such costs. Doubtless it would, if the music publishing corporations so requested, since Fox, as ASCAP, is a creature of the music publishing corporations; and they might well ask, if direct licensing were inevitable and there was a need for Fox to be involved.

But there is an easier and cheaper way. Fox knows which publishers own which songs because the publishers systematically supply Fox with that information, which Fox records in a computerized file (Berman Tr. 799-800, 810-12). In a direct licensing world, they would have equal incentive also to supply such information to the television networks—along with the names and telephone numbers of the publisher employees or agents authorized so to deal—so that the networks might record it in their computerized records and make it immediately available to each packager when he called.

But there is even an easier way than that. ASCAP already maintains complete ownership information about all songs in its pool on reels of computer tape (Report of United States Magistrate Raby, dated November 29, 1972, at 8). It must do so in order to distribute revenues to the music publishing corporations on a per-use basis (in respect of all users' perform-

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[16] For television network purposes, synchronization rights licenses are not required for all programs. By definition, they are unnecessary for live programs (such as sporting events and public affairs); and by virtue of an agreement (sometimes referred to as the "Kinescope Letter") made in the 1950's between the networks and ASCAP and BMI (based on undertakings ASCAP and BMI obtained from their members), they need not be secured for the initial network run of Kinescoped or taped programs (which were analogized to live programming). E 898, 1040-41; Berman Tr. 982-83.

Also, most synch rights deals are made at relatively low "list" prices ($50-$150) which each music publishing corporation authorizes Fox to charge without further contact with the publisher (Berman Tr. 813-20, 927). It is likely (and was obviously Mr. Berman's expectation) that most performance rights prices would be negotiated and result in substantially higher amounts.

ances, not just networks'). Again, were direct licensing inevitable, there is no reason why the publishers would not permit networks to access those tapes, and the Fox tapes as well (in the same fashion, electronically, that a company's central processing unit on Park Avenue can access its tape drives located on Fifth Avenue or in Los Angeles—*e.g.,* by telephone).[17]

Third, each music publishing corporation must gear up to license directly. Perhaps the largest job in that process would be to obtain the consents of its hundreds or even thousands of writers to directly license their music for television network use. Publishers would have to review all their contracts with writers to determine where consents were required and, of course, communicate with such writers for that purpose. Almost twenty years ago, publishers performed that task for television synch rights (Lane Tr. 1076-77; Brettler Dep. 499-501). There is no reason, if direct licensing were inevitable, why they would not do so again.

The remainder of their efforts would be devoted simply to preparing them to act as sellers normally act in a competitive market. They all have employees or agents competent to deal in television synch rights and other licensing fields. Many may have to hire and train one or more additional employees to take on the extra work of licensing television performance rights. Publishers will also have to establish bookkeeping and billing procedures (doubtless paralleling existing procedures in other direct licensing fields), prepare simple standard license forms (such as those now used in other fields, *see, e.g.*, PX's 550, 552-58, 560-61) and perhaps consult their lawyers regarding those forms.

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[17] We know, on the other hand, that ASCAP would never voluntarily grant access to its tapes, absent relief in this case, to aid any network in a bypass attempt. For example, ASCAP vigorously opposed the production of those tapes during the discovery process in this case and then obtained a protective order prohibiting use of the tapes for other than litigation purposes (*see* Report of United States Magistrate Raby, dated November 29, 1972, at 8; Memorandum to all counsel from Judge Lasker, dated December 15, 1972, para. 3; Protective Orders, dated January 26, 1973 and February 7, 1973).

There is, at minimum, a significant risk that publishers generally would not undertake these labors and expenses if the blanket-only policy remained staunchly in effect and two networks continued in the blanket license fold. Merely by forebearing from incurring these costs for a short time, the publishers would have produced a situation in which they would not have to incur them at all, and the present system which they strenuously prefer would be perpetuated.

On the other hand, they would have no choice but to create direct licensing facilities if the present blanket policy were terminated, and the one-shot start-up costs entailed would be nothing more than the reasonable costs of doing business.

Thus, as three courts have found, direct licensing is a distinctly feasible alternative. Indeed, it would have emerged long prior to this but for the blanket-only strands with which ASCAP has hog-tied competition for the past 30 years and which are this suit's sole objective to unravel.

Argument

POINT I

THE RECORD FULLY SUBSTANTIATES THE CONCLUSION THAT ASCAP'S ALL-OR-NOTHING BLANKET-LICENSING POLICY UNREASONABLY RESTRAINS COMPETITION (QUESTIONS 1 AND 3).[18]

A. Basic Principles.

1. A practice agreed upon and engaged in by otherwise competing sellers is unlawful under the rule of reason if its anticompetitive effects outweigh its procompetitive effects, if any. *National Society of Professional Engineers* v. *United*

[18] Counsel for defendants agreed at the scheduling conference held before Staff Counsel Nathaniel Fensterstock on July 19, 1979, that the record was sufficient to enable this Court "to decide whether the exclusive blanket license tendered to CBS television network by ASCAP and BMI is unlawful price-fixing and an unreasonable restraint of trade under the rule of reason or as a misuse of copyright."

(Footnote continued on next page.)

States, 435 U.S. 679 (1978); *Berkey Photo, Inc.* v. *Eastman Kodak Co.,* 1979-1 Trade Cas. ¶62,718, at 78,028 (2d Cir.), *petition for cert. filed,* 40 U.S.L.W. 3174 (U.S. Sept. 25, 1979) (No. 79-427); *Smith* v. *Pro Football, Inc.,* 593 F.2d 1173 (D.C. Cir. 1978); *Newburger, Loeb & Co.* v. *Gross,* 563 F.2d 1057, 1082-83 (2d Cir. 1977).

Another way of stating the same test is that rule-of-reason illegality is established when the practice complained of is more restrictive of competition than reasonably necessary (*White Motor Co.* v. *United States,* 372 U.S. 253, 270 (Brennan, J., concurring); *Berkey Photo, Inc.,* v. *Eastman Kodak Co.,* 1979-1 Trade Cas. at 78,028); and that determination rests, in turn, on whether significantly less restrictive alternatives are available.

If not, the practice must be necessary to the functioning of the market, and thus procompetitive. As this Court previously stated here,

> "It would seem reasonable to conclude that Section 1 of the Sherman Act, which prohibits combinations in restraint of trade, should be construed so as not to prohibit

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While the bases for that conclusion are particularized further in this Point I, the following may be noted here.

The trial, which came after extensive discovery, consumed 29 court days over a period of eight weeks. The transcript is approximately 5,000 pages long; 30 witnesses testified; 24 depositions were introduced in evidence; and more than 500 other exhibits were received. The district court's opinion, based on that record, exceeded 100 typewritten pages.

During the trial, CBS developed at length "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *National Society of Professional Engineers v. United States,* 435 U.S. 679, 692 (1978). Indeed, ASCAP stated to the Supreme Court that "the industry was studied in every detail" in the district court, and ASCAP's conduct was "tested by the rule of reason" (ASCAP Br. 16, 37). Similarly, in BMI's words, a "full rule of reason trial [has] already taken place" (BMI Br. 14) and "[e]very aspect of music licensing was examined in depth at the trial" (BMI Petition for Certiorari 9). Mr. Justice Stevens, who alone on the Court considered the sufficiency of the record, observed that it was "a full one" and that the findings "clearly reveal that the challenged policy does have a significant adverse impact on competition" (99 S. Ct. at 1566).

> the very trade it was intended to protect." 562 F.2d at 137-38.

If, on the other hand, significantly less restrictive alternatives exist, the practice is, by definition, more restrictive than reasonably necessary—*i.e.*, its anticompetitive effects predominate.

2. The weight assigned in this balancing process to anticompetitive effects is a function of, among other things, the extent to which the combination committing them occupies the market in question. As Justice Stevens stated in this case, "Antitrust policy requires that great aggregations of economic power be closely scrutinized" (99 S. Ct. at 1571). For example,

> "[I]t is well settled that a sales practice that is permissible for a small vendor, at least when no coercion is present, may be unreasonable when employed by a company that dominates the market." *Id.* at 1567.

And, as the Solicitor General stated in his *amicus* brief in *K-91*, "joint selling agencies or other pooled activities," permitted where "necessary for a market to function," should be "subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created" (JA 127, 130; *see also id.*, "the combination of copyright holders which ASCAP represents requires the closest scrutiny under the antitrust laws").

3. Anticompetitive purpose is not an element of the offense but still pertinent to it; for, to the extent that anticompetitive impact is otherwise uncertain, proof that the defendants intended that effect will warrant a finding that it occurred and establish its unreasonableness. *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 n.13, 446-47 n.22 (1978).

4. On the other side of the scales, only those effects which are procompetitive in an economic sense are considered. In *Professional Engineers*, the Supreme Court stated,

> "Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor

> of a challenged restraint that may fall within the realm of reason." 435 U.S. at 688.

Instead, the Court stated, "inquiry is confined to a consideration of impact on competitive conditions" (*id.* at 690).

In *Smith v. Pro Football, Inc., supra,* the District of Columbia Circuit viewed this pronouncement as "[e]nding decades of uncertainty as to the proper scope of inquiry under the rule of reason" (593 F.2d at 1186). And the court there held the NFL player draft unlawful under the rule because (a) it had an obvious anticompetitive effect (*id.* at 1187), (b) it "was not shown to have any significant offsetting procompetitive impact in the economic sense" (*id.*), and (c) "there exist significantly less anticompetitive alternatives to the draft system" (*id.*).

In sum, the argument cannot legitimately be made that a practice which restrains competition does so reasonably, where

> (a) it produces no procompetitive effects in the economic sense; and
>
> (b) there are perfectly feasible and significantly less restrictive alternatives.

Particularly is that so where, as Justice Stevens observed here, the market at issue "is wholly dominated" by the practice complained of (99 S. Ct. at 1568; *see id.* at 1555 (White, J.)). And particularly is that so where even the business purposes claimed for the practice, which are not procompetitive in the *Professional Engineers* sense, are equally well or better served by less restrictive alternatives.

In that event, even anticompetitive intent is clear. For as to the question that arises—why don't the members of this combination adopt the perfectly feasible, less restrictive alternative—the answer inevitably is: because they *want* to restrain competition.

So here.

B. ASCAP's Deliberate Achievement of Anticompetitive Effects.

ASCAP knows that the blanket license economically precludes the licensee from engaging in direct licensing.

ASCAP knows that its blanket-only policy thus restrains, indeed eliminates, price competition; that under that system, as Justice Stevens concluded, "there is no price competition between separate musical compositions" (99 S. Ct. at 1568-69) and "marketwide price discrimination" abounds (*id.* at 1571); and that this system represents, as this Court previously found, "the fixing of a collective price" (562 F. 2d at 135). Those effects are too patent not to be appreciated by the beneficiaries of them; and, in fact, this record evidences their most lively appreciation of these unique benefits in prose that is vividly purple (Add. A-C; *see* pp. 16-22 *supra*).

ASCAP knows that competitive conditions would immediately emerge if it ceased licensing television networks at all, or licensed them on the same sort of per-use basis it now uses to distribute royalties to its members.

ASCAP knows that any attempt by a single network to oust ASCAP from this market and single-handedly create competitive conditions would mire the network in unprecedented costs and risks.

And ASCAP knows that it could either withdraw, or license music uses at separate prices, without any cognizable cost or risk to itself or its members.

But precisely to prevent the emergence of competitive conditions, ASCAP declines to do either.

Unless directed to do so by the Court, it never will, and why should it? ASCAP now operates as a supragovernmental taxing authority. Its publisher members need do nothing in this market—absolutely nothing—to collect those levies on the networks but sit on their huge catalogs of songs. They think of ASCAP as a "legal monopoly" (Brettler D 201). Quite a

"comfortable" arrangement (Copland Tr. 3486; *see* Washington D 984-85), if you can get away with it.

Thus, ASCAP fought the development of direct licensing of movie rights for nearly 30 years. It fought direct licensing of television station rights in the 1960's; and it is still waging that battle. It has fought direct licensing of television network rights for more than 10 years; and it is obviously still conducting that fight, as well.

Justice Stevens concluded that

> "Since the record describes a market that could be competitive and is not, and since that market is dominated by two firms engaged in a single, blanket method of dealing, it surely seems logical to conclude that trade has been restrained unreasonably." 99 S. Ct. at 1569-70.

And in the *NBC* proceeding the Department of Justice stated to this Court that "ASCAP's refusal to cooperate" in the development of a less restrictive licensing alternative is "not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices" (Brief of the United States at 15).

Yet ASCAP fights on.

C. The Absence of Procompetitive Justification.

As Mr. Justice Stevens declared,

> "The current state of the market cannot be explained on the ground that it could not operate competitively, or that issuance of more limited—and thus less restrictive—licenses by ASCAP is not feasible. The District Court's findings disclose no reason why music performing rights could not be negotiated on a per-composition or per-use basis, either with the composer or publisher directly or with an agent such as ASCAP." 99 S. Ct. at 1569.

ASCAP's stated reasons for refusing to cooperate in the development of such less restrictive alternatives serve only to demonstrate more plainly its anticompetitive intent.

1. ASCAP's first response to this suit and to CBS's prior request for a per-use license was, in effect, "You didn't give us enough time to think about it" (*see e.g.*, JA 33-34; ASCAP Trial Memorandum of April 25, 1973, at 28). But, of course, ASCAP has not had only several weeks to think about licensing networks on a per-use basis—it has had more than 10 years. And, again, when ASCAP's President, Stanley Adams, was asked whether the ASCAP Board gave any serious consideration to granting per-use licensing as opposed to defending this suit, his reaction was: When you "think somebody is going to put a match to your house you generally get a hose to put out the fire" (D7).

2. ASCAP's further response was their counterclaim filed in this case, which flatly states that CBS's attempt to enjoin the blanket-licensing system is part of a "plan and program" to "depress the price [it] pays for performance rights" (JA 56). And if ASCAP's purpose in opposing relief to the blanket-only system is to prevent a depression of the price, its purpose in maintaining the blanket-only system is obviously to maintain the price.

In other words, this argument by ASCAP is substantively identical to the argument made by the Society of Professional Engineers that competitive bidding would pressure price reductions. It is as clear an admission of anticompetitive intent as could possibly be found.[19] *See National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 684-85, 693-94 (1978).

3. ASCAP's next response was that a per-use license would impose a ceiling price on songs left within the coverage of that license (*i.e.*, if the ASCAP per-use "list" price were $500 a use, the program packager would never have to pay more than $500 and could bargain the publisher down from that point). The short answer to that contention is that an ASCAP per-use license could not possibly exert a ceiling price effect on songs

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[19] And, of course, it is far from the only one—see those collected in Addenda A-C and the brief discussion at pages 16-22, *supra*, in the Statement of Facts.

that the publisher had not authorized ASCAP to license for television network use; and the publisher's right to withdraw any song, and negotiate whatever price he chose, has been a feature of the per-use proposal from the outset.

4. On the prior argument of this appeal, ASCAP had yet another purported explanation. Judge Gurfein asked ASCAP counsel,

> "Let's get down to brass tacks. What is your objection to a per use system?" (Tr. 64)

—to which counsel responded, as Lewis Carroll might have, that it would be price-fixing and anticompetitive (*id.* at 66-67).

But certainly per-use licensing would *not* be price-fixing in any sense and would be procompetitive in all respects, if each per-use "list" price offered by ASCAP were set independently by each music publishing corporation—without collusion with either other music publishing corporations or ASCAP itself. Yet ASCAP opposes that system.

And even a system of standard per-use rates, negotiated between ASCAP and the networks, or set by the court, would be far less restrictive than the blanket-only policy, so long as music publishing corporations were free to deal at directly negotiated fees in addition to the standard per-use rates offered by ASCAP. Literally, the ASCAP per-use rates in such a system would be price-fixed, as is the present blanket fee. But the blanket license does not permit any direct licensing, whereas an ASCAP per-use license would encourage it. That single difference would ultimately render ASCAP's licensing role obsolete, and this market, thoroughly competitive.

Thus, for ASCAP to say that it opposes per-use licensing because it wishes not to become a price-fixing instrumentality is a bad joke. That is precisely what ASCAP now is. ASCAP objects to becoming a relatively ineffectual and ultimately obsolete price-fixing instrumentality, which is precisely what per-use licensing will achieve.

Indeed, if ASCAP's purported concerns about being a price-fixer or about the so-called "ceiling effect" of per-use licensing were genuine, it would promptly withdraw from this market; for that would completely remove any basis, if there were one, for either concern.

5. In the Supreme Court, ASCAP implied that a direct-licensing market would increase its costs of monitoring network uses for infringement. Utter nonsense—and ASCAP well knows that, too. Direct licensing will not increase monitoring costs; it will substantially reduce monitoring costs, probably to a *de minimis* level.

ASCAP now performs the most complete monitoring job imaginable, entering into its vast computer system complete information regarding every single network use. It must do so, so that it can distribute revenues to its members on a per-use basis. If music were directly licensed, it would have no such need. For we are not talking about the sort of ephemeral uses made by radio stations; we are talking about uses permanently recorded on film or tape, with cue sheets and logs further memorializing those uses. Marks Tr. 2465-66, 2469-70; Poklitar Tr. 2060-64; McLaughlin Dep. 310-19; E 219, 222-24.

The movie industry and the phonograph record industry are self-policing—a system that works because the uses are permanently recorded, and penalties for infringement, high (Mingle Tr. 884-85). It is inherently implausible that ASCAP members will any more desire to waste their money on superfluously elaborate monitoring systems for network television than they presently do for phonograph records or movies.

6. Defendants further suggested to the Supreme Court that their insistence on a blanket-only policy could be justified by transactional efficiencies. But of what nature are these in the network market? Surely, ASCAP is not pointing to the "efficiencies" achieved by the fact that music publishing corporations do not now have personnel trained to license television network performance rights directly. Every industry in the United States could achieve "efficiencies" of that nature if all

the sellers simply fired all their salesmen and sold exclusively through a central committee at a fixed price.

The Supreme Court assumed that "ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times" (99 S. Ct. at 1563). Of course that's true in the sense that it saves the packager the cost of increasing the length of telephone calls he may in any event make to license synch rights, or the cost of any negotiations with the publisher in cases where synch rights are not required. But those cost savings, as well as obviating the need for additional publisher employees, would be more than offset by the enormous savings achievable if blanket licensing were eliminated.

In that event, the savings would include (a) the cost of typically lengthy and tedious negotiations between each network and the licensing organizations concerning blanket license terms, with teams of businessmen and lawyers for both sides (the last CBS-ASCAP negotiations took five years, 1965-69, to complete (*see* PX 524)); (b) the cost of consent decree litigation that is ordinarily commenced each time a blanket license comes up for renewal[20]; (c) the cost of negotiations between BMI and its affiliates as to how their revenues are to be distributed; (d) the cost of negotiations and further consent decree proceedings involving the appropriate division of the ASCAP pie; (e) the cost of the ASCAP Special Distribution Advisors appointed under the decree, the survey experts (Robert Nathan Associates) appointed by ASCAP, and the involvement of both the Department of Justice and the Court in that ASCAP distribution process; (f) the cost of monitoring and

[20] At the conclusion of each blanket licensing term, consent decree proceedings are normally commenced which confer an interim license on the network and serve as a vehicle for negotiating the next term's blanket fees. As the district court's records disclose, these proceedings involve considerable motion practice, particularly regarding the amount of interim fees, and sometimes discovery regarding final fees, even though there has never been a trial at which evidence has been taken, or any judicial act in respect of final fees other than dismissals based on negotiated settlements.

recording full data regarding every single network use of music; and (g) the economic costs, such as the misallocation of resources, resulting from the absence of price competition (*see* 99 S. Ct. at 1568-69 (Stevens, J.)).

The Harry Fox overhead is less than 5% of royalties; and that covers its entire licensing, billing and distribution services as well as the small amount of monitoring it does.[21] ASCAP's overhead is annually close to or in excess of 20% of revenues (*e.g.*, AX 232). To proclaim ASCAP's transactional "efficiencies," therefore, is to herald the "Emperor's Clothes."

Indeed, fully to appreciate the transactional *inefficiencies* of the present system one must recognize that ASCAP and BMI each monitor and record uses of not only the music in its own pool, but also the music in the other's pool (McLaughlin Dep. 310-19; Weisgold Dep. 43-48; Marks Tr. 2465-65a, 2469-72; Cramer Tr. 4255a-56; E 221-24). Hence, the costs to be saved in a direct licensing market would be those of two completely overlapping monitoring systems.

7. It should also be noted that ASCAP has never argued, and could not rationally do so, that it must blanket license

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[21] The Harry Fox Agency commission on mechanical rights licenses is 3¼% for publishers whose gross receipts from such licenses are in excess of $25,000 per year, and 4½% for other publishers (Berman Tr. 837-38). Mr. Albert Berman, Managing Director of the Fox Agency, explained that these fees were reduced from 3½% and 5% respectively, because he found that "our costs were less than our income" (Tr. 838).

For the several hundred yearly movie rights licenses, Fox charges a 10% commission on a synchronization rights license and 5% for a performance rights license, with a maximum fee (which applies in most cases) of $150 (Berman Tr. 844-45; Mingle Tr. 854, 858). Since license fees for movie rights typically range from $750 to $20,000 (Mingle Tr. 869-70), the effective commission is substantially less than the 10% and 5% charge, and at times is under 1%.

Fox charges a 10% commission on television synchronization rights licenses (Berman Tr. 920). Since, with rare exceptions, the price range of such licenses is $50 to $150, Fox normally collects between $5 and $15 for its services (Berman Tr. 927).

television networks in order to be able to blanket license radio stations (for which, arguably, there is a blanket license need). Certainly ASCAP has never suggested that the revenues it obtains from television networks are somehow necessary to support its licensing or sample monitoring of radio stations. And even if there were any basis for believing that to be true, there is hardly any reason for concluding that one category of users should subsidize another.

8. In short, the reason ASCAP refuses to cooperate in the development of less restrictive licensing alternatives is the reason its counterclaim states: it wishes not to depress price by permitting a market governed by competitive conditions. Of course ASCAP dresses that point up by complaining about the prospect of enormous CBS dealing one-on-one with Aaron Copland or the George Gershwin estate. But as Justice Stevens stated as a matter of law:

> "The fact that CBS has substantial market power does not deprive it of the right to complain when trade is restrained. Large buyers, as well as small, are protected by the antitrust laws. . . . Moreover, a conclusion that excessive competition would cause one side of the market more harm than good may justify a legislative exemption from the antitrust laws, but does not constitute a defense to a violation of the Sherman Act." 99 S. Ct. at 1570.

Yet, as a matter of fact, CBS will not be dealing with Aaron Copland.[22]

The independent packagers of network programs will be dealing for music performance rights as they now deal for every other program element and right. When they now commission composers to write music especially for television, they pay them $1,000 to $2,500 a week for everything but the performance right (Wright Tr. 422-24; Vincent Tr. 599-601; Sunga

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[22] CBS produces less than 5% of the programs appearing on its network (*see* 400 F. Supp. at 742, 755).

Tr. 747), so it is hardly persuasive to claim that those people have inadequate bargaining power in dealing with packagers.

As to published music, the packagers will deal with the music publishing corporations, the major ones of which belong to conglomerate companies as large or larger than CBS. Those companies and all other music publishing corporations, when dealing in movie rights, regularly obtain anywhere from $750 to $20,000 for each song used in a film (Mingle Tr. 869-70). There is no basis for concluding that the motion picture producers which pay those fees have any less bargaining power than the independent packagers of television programs; by and large, they are exactly the same companies (*e.g.*, Sipes Tr. 18-19; Chiantia Tr. 2856-60).

9. The Supreme Court majority indicated the critical rule-of-reason distinction applicable to this case.

On the one hand, the Court recognized that there may be some markets in which direct licensing bears a "prohibitive" cost or is otherwise a "virtual impossibility" (*e.g.*, those in which uses are governed by "[t]he disc-jockey's itchy fingers" or "the bandleader's restive baton," where licensing, "it is said, cannot wait for contracts to be drawn with ASCAP's individual publisher members, much less for the formal acquiescence of the characteristically unavailable composer or author") (99 S. Ct. at 1563 & n.37). In such fields, if that is true, blanket licensing has a procompetitive element, for it *makes* "a market in which individual composers are inherently unable to fully effectively compete" (*id.* at 1564). Thus, there it may be said that the blanket license is "greater than the sum of its parts; it is, to some extent, a different product" (*id.* at 1563)—which is simply another way of stating there exists a market necessity for blanket licensing that direct dealing in separate performance rights cannot fulfull.

On the other hand, the Court also recognized that

> "With the advent of radio and television networks, market conditions changed, and the necessity for and

> advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public." *Id.*

And without such necessity, the blanket license does *not,* by definition, make "a market in which individual [publishers] are inherently unable to fully effectively compete" (*id.* at 1564); and it is *not* "a different product" (*id.* at 1563). In these circumstances, the Court made clear, the justification for the practice is "undercut" (*id.* at 1563 n.34).

The Supreme Court majority preferred this Court "first to address" the issue as to which side of the line blanket licensing in the network market falls (*id.* at 1565 n.44); but the Court virtually answered the question itself (as Justice Stevens did, fully and expressly) when it cited examples for the sorts of fields in which the lack of necessity would "undercut the justification for the practice":

> "Because of their nature, dramatic rights, such as for musicals, can be negotiated individually and well in advance of the time of performance. *The same is true of various other rights, such as* sheet music, recording, and *synchronization, which are licensed on an individual basis.*" *Id.* at 1563 n.37 (emphasis added).

Plainly, what is true of synchronization rights is true of performance rights. Indeed, as discussed above, the packager of network programs, when licensing synchronization rights, is now obliged to take pains to *split off* performance rights from the transaction.

In sum, on the side of the scales one might look for counterbalances to anticompetitive restraints, there is nothing but a vacuum, whereas on the other side, the purposes and effects proscribed by the rule of reason are manifest and many.

D. Present Barriers to Direct Licensing.

Moreover, the barriers to direct licensing, which are generated by and shelter an anticompetitive system, are themselves anticompetitive effects which must be considered in the rule-of-reason calculus.

Justice Stevens so concluded (*id.* at 1570-71). And though the district court did not use the term "barriers," those are exactly what its findings described—to an extent fully sufficient to support Justice Stevens' conclusion.

Thus, it is not material that the district court predicted that the music-in-the-can problem would not rise to the level of concerted "hold-ups" (400 F. Supp. at 775-76). What counts are the court's findings of the facts that create the present music-in-the-can problem (*id.* at 759, 767, 775-77; *see* pp. 13-17, 19 *supra*).

It is similarly not important that the district court predicted that publisher and writer antipathy to direct licensing would not rise to the level of concerted refusals to deal (400 F. Supp. at 767-68). What counts are the court's findings that such disinclination to deal directly exists (*id.* at 767; *see* pp. 8, 16-22, *supra*).

Likewise, the district court's prediction that the lack of, and need for, direct licensing facilities would not rise to the level of mechanical impracticability is also beside the point (400 F. Supp. at 757-65). What counts is the court's finding that the surmounting of these problems will require a "long period of advance preparation" of at least a year ("during which," as Justice Stevens noted, the network "would continue to pay some millions of dollars for its annual blanket license," 99 S. Ct. at 1570) (400 F. Supp. at 759, 777; *see* pp. 15-16, 28-29, *supra*).

Indeed, that finding should be dispositive under *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). For a self-help alternative requiring such a "long period of advance preparation" no more relieves an unneces-

sarily restrictive licensing system than it did the so-called "ethical" rule invalidated in that case.

In *Professional Engineers,* customers of engineering services could get access to a competitive market, if they wanted to spend the time and trouble nominating one engineer, getting his price, rescinding that relationship, nominating another engineer, getting his price, and so on (435 U.S. at 684 n.6; *see also id.* at 700 (Blackmun, J., concurring)). And in far less than the year required here, any one customer could get the functional equivalent of competitive bids. But no customer was likely to incur that cost and spend that time.

Thus, the Supreme Court held that this "ethical" rule violated the rule-of-reason, even though there was no agreement by engineers on the prices at which they would sell (*id.* at 692). Here, there is indisputably an agreement on the prices at which competitors sell, and the time, cost and risk barriers deferring and deflecting access to a competitive market are obviously greater than any previously confronting the customer of engineering services.

ASCAP relies on the district court's findings that these barriers are not insurmountable. Fine. Few are. The barriers involved here have been sufficient to foreclose three national television networks from access to a competitive market for more than 30 years.

As Justice Stevens observed, these "unprecedented costs and risks,"

> ". . . coupled with the certain and predictable costs and delays associated with a change in its method of purchasing music, unquestionably inhibit any CBS management decision to embark on a competitive crusade." 99 S. Ct. at 1571.

Therefore, as a matter of law,

> "Whatever management decision CBS should or might have made, it is perfectly clear that the question

whether competition in the market has been unduly restrained is not one that any single company's management is authorized to answer. It is often the case that an arrangement among competitors will not serve to eliminate competition forever, but only to delay its appearance or to increase the costs of new entry. . . . *An arrangement that produces marketwide price discrimination and significant barriers to entry unreasonably restrains trade even if the discrimination and the barriers have only a limited life expectancy.* History suggests, however, that these restraints have an enduring character." *Id.* at 1571 (emphasis added).

Hence, Justice Stevens concluded, and was plainly correct, that

"Far from establishing ASCAP's immunity from liability, these District Court findings, in my judgment, confirm the illegality of its conduct." *Id.* at 1570.[23]

POINT II

A HOLDING OF ILLEGALITY HERE WILL NOT NECESSARILY INVALIDATE THE BLANKET LICENSING OF RADIO OR TELEVISION STATIONS OR OTHER USERS (QUESTION 4).

The blanket license restrains competition by its terms, whether issued to television networks or any other category of users. That is so because it forecloses price competition

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[23] We believe it to be clear (and thus discuss only in this note) that the unjustified fixing of prices on performance rights to copyrighted music constitutes copyright misuse. 562 F.2d at 141 n.29; 99 S. Ct. at 1567 (Stevens, J.); *see United States v. Loew's, Inc.* 371 U.S. 38, 45-56 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Tempo Music, Inc. v. Myers*, 407 F.2d 503, 507 (4th Cir. 1969); *M. Witmark & Sons v. Jensen*, 80 F.Supp. 843, 849-50 (D. Minn. 1948) *appeal dismissed mem. sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949); *cf. Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942) (patent misuse); *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661 (1944) (same).

throughout the license term, achieves economic discrimination, and gives rise to barriers to direct licensing which "are real and significant" (99 S. Ct. at 1570).

In the present case it is plain that such restraints are more than reasonably necessary, in the light of perfectly feasible, less restrictive alternatives. But that fact has not yet been proven in *Buffalo Broadcasting Co.* v. *ASCAP*, 78 Civ. 5670 (S.D.N.Y. Complaint filed November 20, 1978), or in any litigation conducted by other users; and the present record does not establish that fact for markets other than that involved here.

Therefore, a decision of liability on this appeal will not in itself determine the outcome of the television stations' suit, although the issue consequently framed, concerning the feasibility of alternatives, is one on which, we believe, the stations should prevail.

POINT III

UNDER CERTAIN CONDITIONS IT WOULD NOT BE ILLEGAL FOR THE MEMBERS TO AUTHORIZE ASCAP TO ISSUE LICENSES FOR INDIVIDUAL COMPOSITIONS BASED ON PRICES DETERMINED BY THE COPYRIGHT OWNERS (QUESTION 5).

The system posited, as we understand it, would be one in which ASCAP was authorized to quote per-use fees that were, in effect, "list" prices set by each music publishing corporation. In the main, the Harry Fox Agency's initial quotations on synch rights are "list" prices set in that fashion. Such a system is not inherently unlawful and is certainly far less restrictive than the blanket system. But appropriate safeguards and conditions would be required.

First (and we assume this is implicit in the Court's question), the copyright owners would have to be free to license directly at negotiated prices. Otherwise, the system would amount to a conspiracy not to sell at any price other than "list."

Second, the system would have to provide for judicial determination of per-use fees for music-in-the-can, if they could not be negotiated between ASCAP and each network. Otherwise, music publishing corporations would be authorized to profit inordinately from their past restraints of trade. *Alden-Rochelle, Inc.* v. *ASCAP, supra.*

Third, this system should not permit the continuation of a blanket license alternative. If it did, music publishing corporations would be unduly encouraged not only to set these "list" prices exceedingly high, but also to refrain from negotiating lower prices directly—for both would effectively force networks back to that alternative which the publishers manifestly prefer.

Fourth, the district court would have to scrutinize the operation of this system with extreme care, for it would dangerously systematize the opportunity for collusion. (As ASCAP management received the calls of each publisher regarding the setting of list prices, it would be easy for them to "suggest" levels beneath which publishers should not price their music, either by indicating that other publishers had priced equivalent compositions higher or by other precatory remarks.) Indeed, given an organization dedicated for 65 years to the fixing of price, it is a veritable blueprint for a "spokes-of-the-wheel" tacit conspiracy, with ASCAP at the hub. *See United States* v. *Masonite Corp.*, 316 U.S. 265, 281-82 (1942); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939); *Penne* v. *Greater Minneapolis Area Board of Realtors*, 1979-2 Trade Cas. ¶62,820 (8th Cir. 1979); D. Turner, "The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal," 75 *Harv. L. Rev.* 655 (1962).

If collusion were to occur—and it would be difficult to detect and prevent—list prices would likely be rigged at levels higher than those which a court would set (reflecting directly negotiated prices), and the colluding sellers would have a built-in incentive not to depart from list.

By far the least restrictive system, on the other hand, and the one easiest to administer, would result from a decree which simply directed ASCAP to stop licensing television networks (as it was enjoined in *Alden-Rochelle* and by the 1950 consent decree from licensing motion picture exhibitors), except for court-set, per-use rates on music-in-the-can. In fairness, for the reasons discussed, those rates should at least apply to the music recorded in the programs and films in each network's inventory at the time of the decree. And we believe there are good arguments why those rates should also apply to presently existing but noninventoried programs and films. Yet, if ASCAP were enjoined from licensing networks, the fact that all networks were in the same boat with respect to noninventory programs and films would reduce the copyright proprietors' single-source leverage with respect to such recorded music. And, if noninventory programs and films were excluded from ASCAP per-use coverage, both the Court's administration of per-use rates for music-in-the-can and ASCAP's involvement in the licensing function would terminate when each network's current inventory of programs and films were exhausted.

These, however, are details of relief. The important points for present purposes are that the defendants' all-or-nothing blanket-licensing policy imposes restraints on competition that per-use licensing would not—and that ASCAP's withdrawal from the market would not—and defendants have no reason for refusing either alternative, except to impose those restraints.

Conclusion

For the foregoing reasons, the order appealed from should be reversed with costs and the district court directed to enter judgment on the liability issue in favor of plaintiff.

September 27, 1979

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff-Appellant, -against AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants-Appellees.	No. 75-7600 AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JOHN MURPHY, being duly sworn, deposes and says that he is over 18 years of age, is not a party to the action and resides at 710 Rhinelander Avenue, Bronx, N.Y. 10462.

That on the 27th day of September, 1979, he served two (2) copies of the annexed brief on the below-listed attorneys by having true copies delivered to them at their offices by hand:

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John Murphy
John Murphy

Sworn to before me this
27th day of September 1979

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